In the Matter of SCHIERBROCK MOTORS *and* TRI-CITY AUTO MECHANICS LODGE 1215, AFFILIATED WITH THE A. F. OF L.

Case No. C-1105.—Decided October 13, 1939

Wholesale and Retail Distribution of Automobiles and Parts—Interference, Restraint, and Coercion: securing of individual contracts of employment during period when conferences with Union were in progress—*Representatives:* proof of choice: membership in union; change in majority representation due to unfair labor practices, disregarded—*Unit Appropriate for Collective Bargaining:* mechanics in garage—*Collective Bargaining:* employer's refusal to bargain collectively with Union as exclusive representative of employees in appropriate unit; execution of individual contracts of employment; ordered, upon request, to bargain with the Union and notify employees that contracts will no longer be enforced.

Mr. Samuel M. Spencer, for the Board.
Mr. Edward A. Doerr, of Davenport, Iowa, for the respondent.
Miss Marcia Hertzmark, of counsel to the Board.

DECISION
AND
ORDER

STATEMENT OF THE CASE

Upon charges duly filed by Tri-City Auto Mechanics Lodge 1215, herein called the Union, the National Labor Relations Board, herein called the Board, by the Regional Director for the Eighteenth Region (Minneapolis, Minnesota),[1] issued its complaint dated November 10, 1938, against Schierbrock Motors, Davenport, Iowa, individually owned by Frank Schierbrock, herein called the respondent, alleging that the respondent had engaged in and was engaging in unfair labor practices affecting commerce, within the meaning of Section 8 (1) and (5) and Section 2 (6) and (7) of the National Labor Relations Act, 49 Stat. 449, herein called the Act. A copy of the complaint and a notice of hearing thereon were duly served upon the respondent and the Union.

[1] The charge was filed in the Thirteenth Region, but was transferred to the Eighteenth Region because of a reclassification of territory covered by the respective regions pursuant to an order of the Board dated May 10, 1938.

With respect to the unfair labor practices, the complaint alleged in substance: (1) that on or about June 14, 1938, the respondent had refused to bargain collectively with the Union as the exclusive representative of his employees in an appropriate unit, consisting of the mechanics employed in his garage at Davenport, Iowa, although a majority of the employees in such unit had, prior to March 1, 1938, and at all times subsequent thereto, designated the Union as their representative; (2) that prior to June 28, 1938, the respondent entered into individual contracts with his employees without the consent or knowledge of the Union, thereby further indicating his refusal to bargain with the Union; and (3) that the respondent had interfered with, restrained, and coerced his employees by refusing to meet with the Union on or about April 10, 1938, and by meeting with the Union on or about June 13, 1938, but refusing to bargain in good faith. The respondent thereafter filed his answer to the complaint, admitting the execution of individual contracts with his employees, but denying that such action constituted a refusal to bargain collectively, and denying the commission of unfair labor practices.

Pursuant to notice, a hearing was held at Davenport, Iowa, on November 21, 1938, before Mapes Davidson, the Trial Examiner duly designated by the Board. The Board and the respondent were represented by counsel and participated in the hearing. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues was afforded all parties. At the beginning of the hearing the respondent moved to dismiss the complaint, or in the alternative, to strike certain pertinent portions, on the ground that the Board lacked jurisdiction because neither the respondent nor his employees were engaged in commerce as defined in the Act; because the respondent had entered into individual contracts with his employees and there was, therefore, no controversy; and because the respondent had not refused to bargain except in that he had entered into the individual contracts, allegedly permissible under the Act. The Trial Examiner denied the motion to strike and reserved decision as to the motion to dismiss. At the close of the hearing the respondent renewed his motion to dismiss and the Trial Examiner denied it. His rulings are hereby affirmed. During the course of the hearing the Trial Examiner made other rulings on motions and on objections to the admission of evidence. The Board has reviewed the rulings of the Trial Examiner and finds that no prejudicial errors were committed. The rulings are hereby affirmed.

On December 29, 1938, the Trial Examiner filed his Intermediate Report and an order allowing a certain stipulation as to facts to be made a part of the record, copies of which were duly served upon the respondent and the Union. The Trial Examiner found that the re-

spondent had engaged in and was engaging in unfair labor practices affecting commerce as alleged in the complaint, and recommended that the respondent cease and desist from engaging in such practices, cease giving any effect to the individual contracts existing between the respondent and his employees, and, upon request, bargain collectively with the Union as the exclusive representative of such employees. The respondent thereafter filed exceptions and amended exceptions to the Intermediate Report.

The Board has considered the exceptions and amended exceptions of the respondent, and in so far as they are inconsistent with the findings, conclusions, and order set forth below, finds no merit in them.

Upon the entire record in the case, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

Frank Schierbrock is engaged, under the name of Schierbrock Motors, in the wholesale and retail distribution of Chrysler and Plymouth automobiles and parts at Davenport, Iowa, and at Moline, Illinois. The Davenport plant is the only one here involved. The respondent has the sole right of distribution of such automobiles in designated areas in Iowa and Illinois and makes individual contracts for delivery to automobile dealers in such areas. In 1937 respondent sold 515 automobiles at wholesale, 60 of which were sold in Iowa and the remainder in Illinois. During that year he sold 214 cars at retail in Davenport, Iowa, of which number about one-fourth were bought by customers from Illinois. Approximately 50 per cent of the automobiles he received during 1937 as distributor and sold at wholesale were delivered directly from the factory in Michigan to Davenport by truck and from there redistributed to dealers in Illinois and Iowa. The other 50 per cent were delivered to the dealers at the factory in Michigan and were driven back to their respective territories by the dealers. In 1938 the respondent received in his plant 232 automobiles from the factory in Michigan and redistributed 29 in Iowa and 86 in Illinois; the rest were sold at retail. About the same number as the total received in the respondent's plant were shipped directly to the dealers.

In 1937 the respondent purchased parts valued at $25,178.10 and sold parts totaling in value $25,601. Of the latter amount, approximately 43 per cent represented parts sold at wholesale both in Iowa and Illinois.[2] In the 10 months of 1938 preceding the hearing, the respondent purchased $20,860 worth of parts and sold parts valued

[2] The exact percentages sold outside Iowa do not appear.

at $17,005. All parts are shipped to respondent's plant by freight or truck from outside the State of Iowa.

II. THE UNION

Tri-City Auto Mechanics Lodge 1215 is a labor organization affiliated with the International Association of Machinists and with the American Federation of Labor. It admits to membership the automobile mechanics employed by the respondent.

III. THE UNFAIR LABOR PRACTICES

A. *The refusal to bargain collectively*

1. The appropriate unit

The complaint alleges, the respondent admits, and the record shows that the two mechanics in the respondent's Davenport, Iowa, plant constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

We find that the mechanics employed by the respondent constitute a unit appropriate for the purposes of collective bargaining and that said unit insures to employees of the respondent the full benefit of their right to self-organization and collective bargaining and otherwise effectuates the policies of the Act.

2. Representation by the Union of a majority in the appropriate unit

At the time of the alleged unfair labor practices, both of the mechanics employed by respondent were members of the Union in good standing and on May 6, 1938, had signed cards authorizing the Union to represent them for purposes of collective bargaining. They joined the Union on January 1, 1938, and paid dues during May 1938 for that month and April.[3] Pursuant to provisions of the Union's constitution, they remained in good standing until September 1, 1938, a period of 3 months' delinquency automatically canceling their membership. Both men testified that subsequent to June 28, 1938, they informed a representative of the Union that they no longer desired to belong to the Union. As we find below, these defections were the direct result of the respondent's unlawful refusal to bargain, and hence may not be regarded as effective to destroy the Union's majority status.

We find that on January 1, 1938, and at all times thereafter, the Union was the duly designated representative of all the employees

[3] The Union was reorganized on January 1, 1938, and members were given credit in the Union for dues paid in advance to the old organization. The two mechanics here involved were members of the old organization.

in the unit hereinabove found to be appropriate for purposes of collective bargaining, and that, pursuant to Section 9 (a) of the Act, it was the exclusive representative of all the employees in such unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment.

3. The refusal to bargain

Early in April 1938, J. T. Farr, the Union's grand-lodge representative, and W. B. Music, then financial secretary of the Union, met with the respondent and requested that he bargain with the Union for the automobile mechanics in his shop. The respondent replied that he saw no reason for a contract because his shop was small, the men were satisfied, and he felt that it was unnecessary for them to belong to a union to secure favorable working conditions. Farr and Music nevertheless left with the respondent a copy of a proposed contract which they were submitting to automobile distributors and dealers in the territory, and asked the respondent to attend a meeting on April 10 between employers and union representatives. Neither the respondent nor any other employer appeared at the April 10 meeting. During the month of May, Farr went to see the respondent on two occasions and, although there was some discussion of the provisions of the contract submitted by the Union, no agreement was reached. Subsequent to these conferences, during the early part of June, Music met with the respondent and attempted to get from him a counterproposal but was told that respondent did not want to talk to Music without his attorney. Arrangements were thereupon made for a conference on the following day. At that meeting Ben Jacobson, president of the Tri-City Federation of Labor, Music, the respondent, and his attorney, Doerr, were present. Doerr told the union representatives that respondent had not refused to bargain and he did not think "it was their intention to." He asked for more time to consider the Union's proposal and was given until the following Tuesday, June 14. On that date the same persons met, and Music and Jacobson were presented with a copy of certain proposed "rules," submitted by the respondent. Music informed the respondent that he thought the proposal was satisfactory except for some provisions which he felt should be included and which would not be detrimental to the respondent. Before this conference adjourned, the respondent and his attorney spoke together privately and Doerr then asked Music if he represented the men or the Union. Music replied that he represented both, to which the respondent answered that he "wouldn't be interested in the union side of it," that he would bargain for the men as individuals, but that he would not sign any agreement with the Union. Music sug-

gested reading a copy of the respondent's proposed rules at the next union meeting, in an effort to secure their approval, but the respondent objected to this being done. Both the respondent and Doerr made notes of Music's suggestions in their copies of the rules proposed by the respondent; Doerr agreed to consider further whether the respondent should deal with the Union or with the individual men, and promised to inform Music of his conclusion.

On June 28 Doerr addressed to Music, as secretary of the Union, a letter stating that the mechanics employed by the respondent had signed individual contracts of employment. Among other things, the letter contained the following:

> My client's privilege to deal with his employees individually is established beyond argument. The contracts expressly reserve to the employees their privilege to engage in union activities.
>
> It appears to me there is little, if anything, left about which we can negotiate further. At least, under the circumstances, it would not be unreasonable for my client to be reluctant to consider terms more advantageous to his employees than those now in force—particularly not since you so recently were satisfied with less. I should also think it reasonable to wait until about the time of expiration of the present contracts before negotiating in respect of a period thereafter. We remain, however, willing to meet with you further if you wish to do so.

The Union made no further effort to negotiate with respondent after the receipt of this letter.

The respondent's position is that, under the provisions of the Act, he is privileged to execute individual contracts with his employees, and that he is under no obligation to sign a contract with the Union as exclusive bargaining representative of his employees within the appropriate unit.

We have previously held that an employer may not avoid his responsibility to deal with the authorized agent of a majority of his employees within an appropriate unit by refusing to enter into a contract with a labor organization and instead offering his employees individual contracts of employment.[4] Were such action to be permitted, it is obvious that there would be little opportunity for a labor organization to secure recognition even though acting as the designated representative of a majority of the employees in a particular unit. There is no doubt that such a course would offer an effective method for rendering fruitless any efforts on the part of labor organizations to bargain for employees.

[4] See, for example, *Matter of The Stolle Corporation* and *Metal Polishers, Buffers, Platers and Helpers International Union*, 13 N. L. R. B. 370.

In support of his contention that he may, without violating the Act, enter into individual contracts with his employees, the respondent cites *National Labor Relations Board* v. *Jones & Laughlin Steel Corporation*,[5] and *Virginian Ry. Co.* v. *System Federation No. 40*,[6] which is cited in the former case. We see nothing in these cases which would validate an evasion of the collective bargaining obligation in the manner attempted here. As we said in *Matter of The Stolle Corporation*,[7] ". . . the right to make individual contracts has not been held by the Supreme Court . . . to be a permissible alternative to the obligation of collective bargaining where the employees have, in accordance with the Act, selected representatives therefor . . ."

We find, therefore, that on June 28, 1938, and at all times thereafter, the respondent refused to bargain collectively with the Union as the exclusive representative of his employees in an appropriate unit. By such refusal the respondent also interfered with, restrained, and coerced his employees in the exercise of the rights guaranteed by Section 7 of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

We find that the activities of the respondent set forth in Section III above, occurring in connection with the operations of the respondent described in Section I above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

The respondent having engaged in unfair labor practices, we shall order him to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act and to restore as nearly as possible the situation which existed prior to the commission of the unfair labor practices.

The respondent contends that the employees here involved are no longer members of the Union and that the Union, therefore, does not represent a majority of the employees within the appropriate unit. The evidence shows, however, that they were members of the Union at the time of the unfair labor practices and had designated the Union to represent them for the purposes of collective bargaining. Their connection with the Union ceased only after the execution of the individual contracts of employment at the instance of the

[5] *National Labor Relations Board* v. *Jones & Laughlin Steel Corporation*, 301 U. S. 1.
[6] *Virginian Ry. Co.* v. *System Federation No. 40*, 300 U. S. 515.
[7] See footnote 4.

respondent. It is plain that the direct cause of their defection from the Union was the respondent's illegal evasion of his duty to bargain with the Union. We cannot permit the respondent to evade his duty to bargain with the Union because of the dissipation of its majority resulting from the commission of his unfair labor practices. We shall order the respondent to bargain with the Union upon request. Since the respondent's refusal to bargain was accomplished through the use of individual contracts, executed in disregard of the Union's authority to bargain for the men, we shall order the respondent to refrain from enforcing or attempting to enforce such individual contracts, and to give appropriate notice to the employees involved that the contracts will not be enforced.

Upon the basis of the above findings of fact and upon the entire record in the case, the Board makes the following:

Conclusions of Law

1. Tri-City Auto Mechanics Lodge 1215 is a labor organization, within the meaning of Section 2 (5) of the Act.

2. The automobile mechanics employed by respondent at his Davenport, Iowa, garage constitute a unit appropriate for the purposes of collective bargaining, within the meaning of Section 9 (b) of the Act.

3. Tri-City Auto Mechanics Lodge 1215 was on January 1, 1938, and at all times thereafter has been, the exclusive representative of all employees in such unit for the purposes of collective bargaining within the meaning of Section 9 (a) of the Act.

4. By refusing to bargain collectively with Tri-City Auto Mechanics Lodge 1215 as the exclusive representative of his employees in the appropriate unit, the respondent has engaged in and is engaging in unfair labor practices, within the meaning of Section 8 (5) of the Act.

5. By the acts set forth in the preceding paragraph, the respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (1) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce, within the meaning of Section 2 (6) and (7) of the Act.

ORDER

Upon the basis of the above findings of fact and conclusions of law and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the

respondent, Frank Schierbrock, doing business as Schierbrock Motors, Davenport, Iowa, and his agents, successors, and assigns, shall:

1. Cease and desist:

(a) From refusing to bargain collectively with Tri-City Auto Mechanics Lodge 1215 as the exclusive representative of the automobile mechanics employed at his Davenport, Iowa, plant;

(b) From in any manner continuing, enforcing, or attempting to enforce the individual contracts of employment with the employees in the unit hereinabove found to be appropriate, or any extension or renewal of such contracts, or any successor contracts thereto;

(c) From in any other manner interfering with, restraining, or coercing his employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the National Labor Relations Act.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain collectively with Tri-City Auto Mechanics Lodge 1215 as the exclusive representative of the automobile mechanics employed at his Davenport, Iowa, plant, with respect to rates of pay, wages, hours of employment, and other conditions of employment;

(b) Notify in writing each of his employees within the unit hereinabove found to be appropriate and with whom individual contracts of employment have been executed, that such contracts will no longer be continued or enforced and that they are thereby removed as an obstacle to collective bargaining by Tri-City Auto Mechanics Lodge 1215, acting as the duly chosen representative of the employees;

(c) Immediately post notices to his employees in conspicuous places throughout his Davenport, Iowa, plant and maintain such notices for a period of at least sixty (60) consecutive days from the date of posting, stating that the respondent will cease and desist in the manner set forth in 1 (a), (b), and (c) and that he will take the affirmative action set forth in 2 (a) and (b) of this Order;

(d) Notify the Regional Director for the Eighteenth Region in writing within ten (10) days from the date of this Order what steps the respondent has taken to comply herewith.